

FILE COPY

STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS
AGAINST
JASON J. JACOB, D.C.,
RESPONDENT.

FINAL DECISION AND ORDER
Case No. LS-9508021-CHI
(93 CHI 082)

PARTIES

The parties in this matter under § 227.44, Stats., and § RL 2.037, Wis. Admin. Code, and for purposes of review under § 227.53, Stats., are:

Complainant:

Division of Enforcement
Department of Regulation and Licensing
Madison, WI 53708-8935

Respondent:

Jason Jacob, D.C.
4874 North Port Washington Road
Glendale, WI 53217

Disciplinary Authority

Chiropractic Examining Board
1400 East Washington Ave.
Madison, WI 53703

PROCEDURAL HISTORY

A. This case was initiated by the filing of a complaint with the Chiropractic Examining Board on August 2, 1995. A disciplinary proceeding (hearing) was scheduled for September 20, 1995. Notice of Hearing was prepared by the Division of Enforcement of the Department of Regulation and Licensing and sent by certified mail on August 2, 1995 to Jason J. Jacob, D.C., 4874 North Port Washington Road, Glendale, WI 53217. This notice was returned unclaimed. A second notice for a hearing date to be determined was sent to Dr. Jacob at 6125 West Capitol Drive, Milwaukee, WI 53216 on August 31, 1995. The second notice was received by Dr. Jacob's office on September 1, 1995.

B. An answer was filed on September 18, 1995 on behalf of Dr. Jacober by attorney Barry Szymanski of Barry Szymanski Associates, S.C., 2300 North Mayfair Road, Wauwatosa, WI 53226-1501.

C. A prehearing conference was held on September 27, 1995 and the hearing was scheduled for December 4, 1995.

D. A prehearing conference was held on October 31, 1995 to address the appearance of witnesses by telephone.

E. During the deposition of a witness on November 27, 1995, objections were heard by telephone and a ruling made that Mr. Szymanski could question the witness about medical treatment received during a limited time before and after her visit to Dr. Jacober.

F. Another prehearing conference was held during the week before the hearing regarding the availability of a witness, and Mr. Szymanski requested an accommodation to allow him to offer testimony by the witness. The issue was held open, to be decided at the hearing.

G. All time limits and notice and service requirements having been met, the disciplinary proceeding was held as scheduled on December 4, 1995. Dr. Jacober appeared in person and represented by attorney Szymanski. The Chiropractic Examining Board was represented by attorney James Polewski of the Department's Division of Enforcement. The hearing was recorded, and a transcript of the hearing was prepared and delivered on January 25, 1996. Confusion involving exhibits submitted with the answer, exhibits marked in a deposition, and additional exhibits marked in the hearing resulted in the hearing exhibits being marked 1 through 8 and 12 through 17. The testimony and exhibits entered into evidence at the hearing form the basis for this Proposed Decision.

H. A Proposed Decision was issued by the Administrative Law Judge on May 31, 1996. On June 13, 1996 the Complainant, Division of Enforcement, filed its Objections to the Proposed Decision. Dr. Jason Jacober and his attorney filed letters dated June 11, 1996 in response to the Proposed Decision, and dated June 20, 1996 in response to the Objections of the Division of Enforcement.

I. At its meeting on July 18, 1996 the Board determined to review the entire record of the case in conjunction with the Proposed Decision and the responses and objections of the parties.

J. At its meeting on August 8, 1996, the Board deliberated upon and decided this matter, and hereby issues its Final Decision and Order.

APPLICABLE RULE AND STATUTE

Chir 6.02 Unprofessional conduct. Unprofessional conduct by a chiropractor includes:

...
(12) Knowingly falsifying patient records.

...

(14) Obtaining or attempting to obtain any compensation for chiropractic services by fraud.

...

(20) Knowingly providing false information to the board or its representative.

...

446.04 Unprofessional conduct. Unprofessional conduct includes, without limitation because of enumeration:

(1) Any conduct of a character likely to deceive or defraud the public

...

FINDINGS OF FACT

1. The respondent, Jason J. Jacober, D.C., is a chiropractor licensed in the state of Wisconsin, under license number 2750, which he has held continuously since it was originally granted on September 12, 1991.

2. Dr. Jacober provided professional services on May 1, 1993 to Mrs. Sally Dzelzkalns in his office at Menomonee Falls Chiropractic in Menomonee Falls, Wisconsin. Menomonee Falls Chiropractic is also referred to as Capitol Chiropractic. Mrs. Dzelzkalns had suffered continuing complications, including neck pain, from an auto accident in 1991. She had received steroid injections and physical therapy, but on one occasion in March of 1993 had received relief from a massage. On Saturday, May 1, 1993, she woke with stiffness in her neck. Her husband, Martin Dzelzkalns, looked for a listing for a massage therapist in the Yellow Pages, and located a listing for a massage therapist which did not indicate that there was any medical licensee involved. The Dzelzkalns called the listing, left a message, and was contacted by a Dr. Varona, who informed him that his masseuse was unavailable, but that he would have someone contact Mr. Dzelzkalns. **Tr. 70, 72, 93-94; Ex. 14 p. 2.** Shortly afterward, Dr. Jacober called, said that he had no masseuse, but that he had equipment for electrical muscle stimulation. Mr. Dzelzkalns then either made an appointment for his wife for 10:00 that morning or let her make the appointment directly. Dr. Jacober's receptionist called her back and asked her to arrive early so that x-rays could be taken, but she told the receptionist that she wanted only a massage. The receptionist then asked her to arrive early to fill out forms.

3. When Mrs. Dzelzkalns arrived at Dr. Jacober's office 10 to 15 minutes prior to her appointment, the receptionist had left for the day, and Dr. Jacober asked her to fill out a Confidential Patient Case History and a General Consent to Care and Assignment of Insurance Benefits. She then waited in the waiting room for a period which she estimated as 40 to 45 minutes while he attended to other patients.

4. Respondent eventually returned to Ms. Dzelzkalns, reviewed the forms she had completed and asked her questions related to the entries she had made on the Confidential Patient Case History. Based on her responses on the Confidential Case History, Dr. Jacober considered that he would be treating a person with complaints of occasional loss of sleep, frequent pain between her shoulders, and frequent pain or numbness in her shoulders or legs (which can be an early symptom of serious neurological problems). Mrs. Dzelzkalns considered her

complaint that morning to be stiffness in her neck and shoulders. Respondent again asked if Ms. Dzelzkalns would allow him to take radiographs, and offered her a course of chiropractic treatment, and she again refused, stating that she only wanted a massage, and was not interested in chiropractic treatment. **Tr. 106-107; Ex. 14, p. 6.**

5. Respondent completed a form labeled "Chiropractic Clinical Examination" prior to providing treatment to Ms. Dzelzkalns. To complete the form, he used the following sources of information:

- the Confidential Patient Case History form which Ms. Dzelzkalns had completed,
- observations of Ms. Dzelzkalns' appearance,
- Ms. Dzelzkalns' response to questions about her condition, and
- observations of Ms. Dzelzkalns' range of motion when he asked her to move her head up and down and side to side.

Respondent did not perform any physical examination of Ms. Dzelzkalns, other than for observing the range of motion of her neck when he asked her to move her head up and down and side to side. Dr. Jacober did not perform pinwheel tests, nor did he perform Adson's test or Wright's test on Mrs. Dzelzkalns. **Tr. 107-115, 197, 199, 339-341, Ex 14.** Dr. Jacober reported in his notes of his contact with Mrs. Dzelzkalns that she had been seen on an emergency basis, by which he meant only that he saw her on an hour's notice without a prior appointment.

6. Following the completion of his examination, Dr. Jacober provided Mrs. Dzelzkalns with unattended electrical muscle stimulation for 12 minutes, combined with a heat pack. **Tr. 113, 114-115, Ex 14.** Before and after this treatment, Dr. Jacober engaged in discussion with Mrs. Dzelzkalns about the possible benefits of alternative treatment, specifically chiropractic, since she had improved little over two years of treatment. When she left, he provided her with one or more ice packs and instructions for their use. Mrs. Dzelzkalns was the last patient Dr. Jacober saw that morning, and she estimated that she arrived home at approximately 11:15 after a drive of approximately 10 to 15 minutes.

7. In the Chiropractic Clinical Examination form, Respondent recorded findings of examinations he did not make, indicating falsely that he had investigated her condition and found it to be as noted. Respondent noted "NAD" for "no abnormality detected" under the topic "EENT" (Eyes, Ears, Nose, Throat) when in fact he had not examined her eyes, ears, nose or throat. Respondent indicated that there were no unusual findings with regard to Ms. Dzelzkalns' cranial nerves, when in fact he performed no examination of the condition of her cranial nerves. Respondent recorded a blood pressure of 135/82 when in fact he did not take a blood pressure reading. Respondent did not provide any manual treatment of Ms. Dzelzkalns, but did provide heat packs and interferential electric muscle stimulation. **Tr. 107-115, 210, Ex 14.**

8. Dr. Jacober estimated for billing purposes that he spent approximately 60 minutes providing services to Mrs. Dzelzkalns. This was an overestimate. The 60-minute estimate does not appear in Dr. Jacober's office records, and he did not falsify the patient records regarding this aspect of his examination of Mrs. Dzelzkalns.

9. Mrs. Dzelzkalns's husband called Dr. Jacober's office on Monday, May 3, 1993 to inquire about the bill for treatment, which he expected to have to pay directly since his health insurance coverage with Blue Cross & Blue Shield United of Wisconsin (hereinafter "Blue Cross") did not cover massages. He was upset when he was told that the charges totaled \$250. Mr. Dzelzkalns went to Dr. Jacober's office to obtain an itemized bill. Upon receiving it, he became offensive and stated either that he would sue Dr. Jacober or that he would only pay \$100 for the "modalities" and that Dr. Jacober would have to sue him for the charge of \$150 for the office visit and examination. Mr. Dzelzkalns requested his wife's records; Dr. Jacober refused, and Mr. Dzelzkalns had his wife come in to request them. Dr. Jacober stated that any further communication should be through his attorney and gave Mr. Dzelzkalns the attorney's name. Mr. Dzelzkalns demanded the attorney's phone number, which Dr. Jacober did not provide. Both Mr. Dzelzkalns and Dr. Jacober were disturbed. Mr. Dzelzkalns did not leave, and Dr. Jacober had his secretary call the police. Mr. Dzelzkalns and his wife waited until the police arrived, and they were escorted from Dr. Jacober's office.

10. On or about May 6, 1993, Dr. Jacober submitted a claim form to Blue Cross, requesting payment for treatment provided to Mrs. Dzelzkalns on May 1, 1993. [exhibit 12, p. 2] Dr. Jacober claimed payment for services under five Current Physician Terminology ("CPT") codes, as follow:

- 99205 \$150 - Office or other outpatient visit for the evaluation and management of a new patient.
- 97014 \$20 - Electric muscle stimulation [unattended]; interferential.
- 97010 \$15 - Cryo-therapy applied to Patient; physical medicine treatment to one area; hot or cold packs.
- 97122 \$15 - Manual traction applied to cervical spine.
- 9907024 \$11 - Supplies and materials

Dr. Jacober did not include a code for an emergency office visit. Blue Cross changed the 99205 code to a code of A2000 (a Blue Cross internal code for a chiropractic office visit carrying a usual and customary charge of \$26), and changed the 9907024 code to a code of A9195 for "cryo-pack supplied to Patient". On May 26, 1993 Blue Cross mailed a Provider Remittance Advice to Dr. Jacober and an Explanation of Benefits form to Mrs. Dzelzkalns. [exhibit 7] The A2000 code continued to show the amount claimed by Dr. Jacober as \$150, though Blue Cross reduced the reimbursement to \$20.80, with a \$5.20 co-payment.

11. On May 28, 1993, Mr. Dzelzkalns called the Blue Cross fraud investigation unit to report what he considered to be overbilling, and Russell Streur interviewed Mrs. Dzelzkalns on June 1, 1993.

12. Following the mailing of the Provider Remittance Advice on May 26th, Dr. Jacober's office called Blue Cross to request that the A2000 code be changed back to a 99205 code. The request was reviewed and denied, at which time Dr. Jacober's office called a second time and insisted that it be changed back. The claim was changed and a revised Provider Remittance Advice was mailed on June 15, 1993. [exhibit 8] The claim for code 99205 was reimbursed by Blue Cross for \$120, with a co-payment of \$30.

13. Dr. Jacober did not bill Mrs. Dzelzkalns for the May 1, 1993 office visit, but referred the matter to a collection agency to collect the copay amount claimed due from Mrs. Dzelzkalns. The collection agency did not pursue the matter after Mrs. Dzelzkalns explained the circumstances, and the copay amount has never been paid. **Tr. 82-91, 123-125.**

14. The description of the service to be billed under CPT code 99205 is as follows:

“Office or other outpatient visit for the evaluation and management of a new patient, which requires these three components:

- a comprehensive history;
- a comprehensive examination; and
- medical decision making of high complexity.

Counseling and/or coordination of care with other providers or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of moderate to high severity. Physicians typically spend 60 minutes face-to-face with the patient and/or family.”

15. Four types of “history” are recognized by the CPT guidelines, as follow:

- Problem Focused - chief complaint; brief history of present illness or problem.
- Expanded Problem Focused - chief complaint; brief history of present illness; problem pertinent system review.
- Detailed - chief complaint; extended history of present illness; extended system review; **pertinent** past, family and/or social history. [emphasis in original]
- Comprehensive - chief complaint; extended history of present illness; complete system review; **complete** past, family and social history. [emphasis in original]

16. Dr. Jacober elicited information from Mrs. Dzelzkalns regarding her chief complaint, a brief history of her present condition, and a problem pertinent system review. He did not take a comprehensive history of Mrs. Dzelzkalns.

17. Four types of “examination” are recognized by the CPT guidelines, as follow:

- Problem Focused - an examination that is limited to the affected body area or organ system.
- Expanded Problem Oriented - an examination of the affected body area or organ system and other symptomatic or related organ systems.
- Detailed - an extended examination of the affected body area(s) and other symptomatic or related organ system(s).
- Comprehensive - a complete single system specialty examination or a complete multi-system examination.

18. Dr. Jacober conducted an examination of Mrs. Dzelzkalns's affected body area, and cursorily noted the absence of symptoms in other body systems. He did not perform a comprehensive examination of Mrs. Dzelzkalns.

19. Four types of "medical decision making" are recognized by the CPT guidelines: straightforward, low complexity, moderate complexity, and high complexity. To qualify for a given type of decision making, two of the three elements in the following table must be met or exceeded:

	Number of diagnoses or management options	Amount and/or complexity of data to be reviewed	Risk of compli- cations and/or morbidity or mortality
Straightforward	<i>minimal</i>	<i>minimal or none</i>	<i>minimal</i>
Low Complexity	<i>limited</i>	<i>limited</i>	<i>low</i>
Moderate Complexity	<i>multiple</i>	<i>moderate</i>	<i>moderate</i>
High Complexity	<i>extensive</i>	<i>extensive</i>	<i>high</i>

20. Dr. Jacober's medical decision making with regard to Mrs. Dzelzkalns involved a limited number of diagnoses or management options, a limited amount and complexity of data to be reviewed, and a low risk of complications, morbidity or mortality. He did not provide medical decision making of high complexity to Mrs. Dzelzkalns.

21. Dr. Jacober's use of billing code 99205 was a misrepresentation of the history, examination and treatment he provided to Mrs. Dzelkahns on May 1, 1993.

22. Dr. Jacober provided false information to the Division of Enforcement by stating in his letter of June 24, 1994 that he had checked Mrs. Dzelzkalns's height and weight and that he performed a pinwheel test, Adson's test and Wright's test on her. Also, because the billing code he used on his claim to Blue Cross was inaccurate, he provided false information by asserting that he had performed all the services for which he billed Blue Cross.

CONCLUSIONS OF LAW

I. The Chiropractic Examining Board is the legal authority responsible for issuing and controlling credentials for chiropractors, under ch. 446, Stats. The Chiropractic Examining Board has jurisdiction over the subject-matter of a complaint alleging unprofessional conduct, under sec. 15.08(5)(c), Stats., sec. 446.05, Stats., and ch. Chir 6, Wis. Admin. Code. The Chiropractic Examining Board has personal jurisdiction over the respondent, Jason J. Jacober, D.C., under sec. 801.04 (2), Stats., based on his receiving notice of the proceeding, and his holding a credential issued by the board.

II. Dr. Jacober falsified his patient health care records for Mrs. Dzelzkalns, which constitutes unprofessional conduct under sec. Chir 6.02 (12), Wis. Admin. Code.

III. Dr. Jacober's conduct in filing a false claim with Blue Cross & Blue Shield United of Wisconsin for treatment he did not provide to Mrs. Dzelzkalns constitutes a violation of sec. Chir 6.02 (14), Wis. Admin. Code, and sec. 446.04, Stats.

IV. Dr. Jacober's notation in his office records that he saw Mrs. Dzelzkalns on an emergency basis was not shown to be inappropriate or a violation of any rule.

V. Dr. Jacober's conduct in providing false information to the Division of Enforcement and in reporting to the Division of Enforcement that he provided all of the services for which he billed Blue Cross & Blue Shield United of Wisconsin constitutes a violation of sec. Chir 6.02 (20), Wis. Admin. Code, and sec. 446.04, Stats.

VI. The violations in II, III and V above constitute unprofessional conduct under sec. Chir 6.02 and sec. 446.04, Stats., and discipline is appropriate, under sec. 446.03, Stats.

ORDER

THEREFORE IT IS ORDERED that the license to practice chiropractic in the state of Wisconsin of respondent, Jason J. Jacober, D.C., be **SUSPENDED** for 30 days, effective January 1, 1997.

IT IS FURTHER ORDERED that the respondent, Jason J. Jacober, D.C., pay the costs of this proceeding, as authorized by sec. 440.22 (2), Stats., and sec. RL 2.18, Wis. Admin. Code, not later than 90 days following the date of this Order. If the costs as ordered herein remain unpaid at the end of the suspension period as imposed herein, Dr. Jacober's license to practice chiropractic in the state of Wisconsin shall not be reinstated unless and until such costs are paid in full to the Department of Regulation and Licensing, pursuant to sec. 440.22 (3), Stats.

EXPLANATION OF VARIANCE

After review of the record of this case, including the transcript of the hearing and exhibits, the Board has accepted the findings of fact and conclusions of law of the Administrative Law Judge (ALJ) with regard to the allegations of the complaint that Dr. Jacober made a false claim to Blue Cross & Blue Shield United of Wisconsin and that he provided false information to the Division of Enforcement. However, after reviewing the record in light of the Objections of the Division of Enforcement, the Board disagrees with the ALJ's findings and conclusions with respect to the allegation that Dr. Jacober falsified his patient records relating to his examination and treatment of the patient, Mrs. Dzelzkalns, on May 1, 1993. The Board is largely persuaded by the analysis of the evidence and testimony set forth in the objections and argument of the Division. The Board finds that Dr. Jacober did falsify his patient record. The Board has made a number of modifications to the findings of fact and conclusions of law in regard to this issue. The modifications to the findings of fact are grounded on the issue of credibility. The Board rejects and reverses the conclusion of the

ALJ on the issue of credibility as explained in the proposed decision. The basis for the modified findings will be explained here in the explanation of variance. The modified findings are summarized here in this explanation of variance, and are noted in the findings of fact where they occur by bold type reference to the record. The Board has modified the Conclusions of Law in accordance with the modified findings. Finally, the Board disagrees with the ALJ's recommendation for discipline, and imposes a 30 day suspension.

The modifications to the findings of fact are as follows. Finding 2. is modified to reflect the testimony of Mrs. Dzelzkalns and her husband on how it came about that Mrs. Dzelzkalns was ultimately seen by Dr. Jacober on May 1, 1993, and for what purpose. Finding 4. is modified to reflect the testimony and statements of Mrs. Dzelzkalns regarding the Dr. Jacober's offer of chiropractic services and x-rays, her refusal of them and her insistence that she was there only for massage therapy. Finding 5. is modified as argued by the Division, to reflect the greater weight accorded to the testimony of Mrs. Dzelzkalns and incorporate findings that Dr. Jacober performed only the examination as testified to by Mrs. Dzelzkalns. Finding 6. is modified only with respect to the type of pack placed upon Mrs. Dzelzkalns by Respondent, again based upon her consistent and definitive testimony in the record. Original Findings 7. and 8. are merged into a single Finding 8., and new Finding 7. is inserted by the Board to incorporate its findings that Dr. Jacober falsified his record in the respects noted, consistent with this explanation of variance. Finding 13. is modified, as argued by the Division, to accurately reflect the testimony that the Dzelzkalns did not ever receive a bill from Dr. Jacober, that the claim for payment was nevertheless referred to collection agencies, and finally, the collection agencies apparently declined further pursuit of the claim upon the circumstances being explained. Finally, Finding 21. is modified to use the proper terminology of "misrepresentation" instead of "inappropriate" to reflect the fact that the ALJ found and concluded, with which the Board agrees, that Dr. Jacober filed a false claim.

The Board has modified the Conclusions of Law as follows. Conclusion II. is modified, consistent with the Board's modified findings, that Dr. Jacober did falsify his patient record of Mrs. Dzelzkalns. Conclusion VI. is modified to include reference to modified Conclusion II. as an additional violation constituting unprofessional conduct.

The Order of the ALJ is modified to impose a 30 day suspension upon Dr. Jacober. Also, as explained herein, the Order imposing costs is modified to be consistent with sec. 440.22(3) and because the Board does not have authority to impose a summary suspension for failure to pay costs.

In this case, among other things, the complainant contends that Dr. Jacober falsified certain aspects of his examination and treatment of Mrs. Dzelzkalns in his patient record relating to his May 1, 1993 encounter with her. Specifically at issue were notations relating to her height, the taking of her blood pressure, examination of her heart and lungs, the taking of her pulse, and examination of her eyes, ears, nose and throat (EENT). Dr. Jacober indicated in his Chiropractic Clinical Examination form that Mrs. Dzelzkalns is 5'6". For blood pressure 135/82 is noted; for pulse 82 is noted; for each of heart, lungs and EENT the notation of "NAD", meaning "no abnormality detected," is recorded. Dr. Jacober also indicated in his "SOAP" notes that he administered manual traction. Dr. Jacober also testified at the hearing that he performed the above noted observation, examination and testing.

Dr. Jacober testified, and the ALJ noted, that he completed portions of his clinical examination record based upon information from Mrs. Dzelzkalns's Confidential Case History form which she completed, and from questions he asked of Mrs. Dzelzkalns regarding her height and dermatome response. This contention as an explanation for Dr. Jacober's entries in the clinical examination record is incredible, and untenable. A chiropractic record of a physical examination of a patient is the record of *objective findings* based upon *physical examination* by a clinically educated and trained health care provider, not the subjective, untrained report of the lay patient. The Board queries what is the point of a patient clinical examination record if the chiropractor is merely *rerecording* information already contained in a patient history form, or recording the lay person's own untrained self-assessment of what his or her physical condition is? To accept this explanation would only raise further questions about the professional competency of such a practice. As argued by the Complainant, a notation of a finding, or the notation of "NAD," or a notation of "CL" signifying "clear" in a patient's chiropractic *clinical examination* record is clearly a representation by the chiropractor that the particular exam was conducted with the result as noted, or that the exam was conducted and no abnormality was detected.

Mrs. Dzelzkalns has consistently and definitively maintained in a statement to the Blue Cross/Blue Shield investigator and upon direct and cross examination, that Dr. Jacober did not measure her height nor ask her what her height was, did not take her blood pressure, did not take her pulse, did not examine her heart or lungs, and did not examine her eyes, ears, nose or throat. She similarly maintained that Dr. Jacober did not apply traction to her neck. Mrs. Dzelzkalns testified consistently and definitively that the only examination and treatment Dr. Jacober performed upon her was a range of movement examination of her neck, electric interferential stimulation on her neck and upper back and application of heat packs to her neck and upper back.

Interestingly, as noted above, Dr. Jacober recorded a height for Mrs. Dzelzkalns of 5'6". In fact, Mrs. Dzelzkalns is 5'8". Dr. Jacober also recorded a blood pressure of 135/82. Mrs. Dzelzkalns testified that her usual blood pressure reading is 130/80.

The ALJ concluded that between Mrs. Dzelzkalns and Dr. Jacober, Dr. Jacober's written recollection of the exam is more credible. At page 9 of his opinion, the ALJ stated:

Two details of the exam were highlighted during testimony as presenting unusual problems. The first was Mrs. Dzelzkalns's height. Dr. Jacober recorded her height as 5'6" although she testified that she is at least 5'8". Dr. Jacober stated that he did not measure it, but merely asked her that question. The discrepancy is inexplicable, and it does suggest that Dr. Jacober made up the height and most of his other entries later, but such an assumption is disproven by the second detail, the blood pressure reading, which Mrs. Dzelzkalns said is normally about 130 over 80. Dr. Jacober recorded her blood pressure as 135 over 82, and this is far too accurate to be a coincidence or a lucky guess. This one solid fact anchors a finding that Dr. Jacober's written recollection of the exam is more credible than Mrs. Dzelzkalns's and that he did in fact take her pulse and blood pressure, perform head and neck compression tests, and palpate her spine. One other inference supports Dr. Jacober's testimony that he did not falsify records after the fact: had he made entries or changes later, he could easily, and would likely, have altered

more items in order to support his position more firmly, such as making notations of the time he spent with Mrs. Dzelzkalns.

The ALJ based this assessment of credibility solely upon the fact that Dr. Jacober noted a blood pressure reading that happened to approximate Mrs. Dzelzkalns's usual blood pressure reading, and an inference that if Dr. Jacober was going to falsify the patient record, he would have falsified more. Upon that fact and speculative inference alone, the ALJ concluded that Mrs. Dzelzkalns is to be disbelieved despite her consistent and definitive testimony, and Dr. Jacober is to be believed concerning the entirety of his examination and treatment of Mrs. Dzelzkalns. The ALJ makes such conclusion, despite the other glaring contradiction between the height of 5'6" recorded by Dr. Jacober and Mrs. Dzelzkalns's true height of 5'8", despite the fact that the ALJ concluded that Dr. Jacober largely overestimated the time he spent with Mrs. Dzelzkalns on May 1, 1993, despite the ALJ's finding and conclusion that Dr. Jacober lied to the Department's investigator regarding other physical examination he supposedly conducted on the patient, and despite the ALJ's finding and conclusion that Dr. Jacober filed a false claim with Blue Cross/Blue Shield, all concerning the same examination of Mrs. Dzelzkalns.

The Board, having read the entire record in this matter and reviewed the exhibits, is not prepared to discredit Mrs. Dzelzkalns account regarding what took place in her encounter with Dr. Jacober solely on the basis of the fact that Dr. Jacober recorded a blood pressure reading that approximates Mrs. Dzelzkalns's usual blood pressure reading. Likewise, the Board is not prepared to credit Dr. Jacober's testimony and patient records as truthful in their entirety solely on his approximation of Ms. Dzelzkalns's usual blood pressure reading. The Board believes that the ALJ assigns too much significance and credit to Dr. Jacober on this point, and ignores the significance and import of the grossly inaccurate height for Mrs. Dzelzkalns recorded by Dr. Jacober in the same visit, and Dr. Jacober's false statement to the investigator and the filing of a false claim to Blue Cross/Blue Shield.

As to the blood pressure reading, the Board notes that it is not difficult at all to make an educated guess of a patient's blood pressure, especially where the patient noted no blood pressure problems in her patient history, and secondly, that the blood pressure noted by Dr. Jacober is not necessarily so accurate as to justify belief that it in fact was taken, and that other examination was performed, especially in light of other discrepancies and Mrs. Dzelzkalns testimony to the contrary. Therefore, the Board ascribes little weight to this point of the blood pressure in Dr. Jacober's favor. With regard to the recording of Mrs. Dzelzkalns's height, it is clearly inaccurate whether it had been measured, or recorded as a result of Dr. Jacober asking Mrs. Dzelzkalns for her height. The inaccurate height much more strongly supports the conclusion that Mrs. Dzelzkalns is to be believed, and Dr. Jacober is not, as to what was done in his examination and treatment of Mrs. Dzelzkalns. This conclusion is bolstered by the fact that Dr. Jacober also grossly overestimated the time he spent with Mrs. Dzelzkalns, lied to the Department investigator regarding other physical examination he had contended he had done, and the conclusion that he filed a false claim with Blue Cross/Blue Shield.

Accordingly, the Board concludes that Mrs. Dzelzkalns's testimony is credible, and that of Dr. Jacober is not, as to the examination conducted by Dr. Jacober on May 1, 1993. Upon the testimony

of Mrs. Dzelzkalns, the inaccuracy of the recorded height, and Dr. Jacober's own admission of having lied to the department's investigator regarding other claimed examination, the Board concludes that Dr. Jacober did not measure Mrs. Dzelzkalns's height (and it is doubtful that he asked her for her height and recorded her response), did not take her blood pressure or pulse, did not examine her heart and lungs, did not examine her eyes, ears nose or throat, and did not apply manual traction to Mrs. Dzelzkalns's neck. Accordingly, the Board further finds and concludes that Dr. Jacober falsified his patient record by the entries of findings, or the notation of "NAD", as to these elements of examination.

The purposes for imposing discipline are a) to promote the rehabilitation of the licensee; b) to protect the public; and c) to deter other licensees from engaging in similar misconduct. *State v. Aldrich*, 71 Wis. 2d 206, 209 (1976). Punishment is not an appropriate consideration or purpose for discipline. *State v. MacIntyre*, 41 Wis. 2d 481, 485 (1969).

Based upon his conclusions that Dr. Jacober filed a false claim with Blue Cross/Blue Shield and that he made false statements to the investigator, the ALJ recommended that Dr. Jacober be reprimanded. Even on the basis of the ALJ's recommended findings and conclusions of the ALJ alone, the Board is of the opinion that a reprimand is insufficient discipline for the purposes of deterrence, rehabilitation and protection of the public. It appears that the ALJ may have been influenced in his assessment of discipline against Dr. Jacober by the ALJ's view that Mr. Dzelzkalns bore some responsibility for Dr. Jacober's conduct. While it may be true that the vehemence of Mr. Dzelzkalns's reaction to a charge of \$250.00 for what was supposed to have been simply massage therapy may have set off Dr. Jacober as well, responsibility for filing a false claim to the insurance company and lying to the department investigator must rest solely and squarely with Dr. Jacober. The Board views fraud very seriously, and lying to an agent acting on its behalf to investigate allegations of unprofessional conduct even more so. Lying to an investigator for the Board in any investigation of allegations of unprofessional conduct impedes and obstructs the Board's ability to carry out its mandate of protection of the health, welfare and safety of the public. Accordingly, the discipline to be assessed, especially in this case involving both fraud and lying to the investigator, must be significantly more severe than a reprimand to effectuate the disciplinary purpose of deterring such misconduct. A substantial period of suspension is warranted based just upon the recommended findings and conclusions of the ALJ. The violations of Dr. Jacober in filing a false claim and lying to the investigator alone are of sufficient seriousness to justify the discipline imposed by the Board in this Final Decision and Order.

The Board has further found and concluded that Dr. Jacober falsified his patient records with respect to his examination of Mrs. Dzelzkalns, adding a third dimension of violation for which discipline may be assessed. The Board notes that truthful and accurate patient recordkeeping is a foundational element of professional practice for the primary benefit of the patient's health, safety and welfare, but also for the professional accountability of the practitioner. The Board views falsification of patient records of equal seriousness with making false statements to an agent of the Board, as well as fraud, and the discipline to be assessed must be of a serious quality to effectuate deterrence of any further such conduct by this licensee and others in the profession.

Dr. Jacober's violations were, by their character, intentional misconduct. Therefore, deterrence is of paramount consideration in assessing discipline. Accordingly, based upon the totality of the misconduct of Dr. Jacober found in this case, all revolving around one encounter with one patient, the Board has determined to impose a 30 day suspension of license upon Dr. Jacober to begin February 1, 1997. The Board considers this discipline to be the minimum measure of discipline commensurate with the violations found. A 30 day suspension will send the message to Dr. Jacober as well as all chiropractors that such misconduct as found in this case will not be tolerated and will be met with appropriately harsh discipline.

Finally, the Board agrees with the ALJ's recommendation to impose the costs of this proceeding. However, as argued by the Division of Enforcement, the Board does not have the authority to impose a summary suspension for failure to pay costs as ordered. The remedy of summary suspension is only authorized in circumstances in which the public health, safety and welfare imperatively requires emergency action, and failure to pay costs of a disciplinary order is not a matter of imminent danger to the public. Authority does exist under sec. 440.22(3), Stats., however, to deny reinstatement of a license if costs of the disciplinary proceeding remain unpaid.

Dated this 4th day of October, 1996.

WISCONSIN CHIROPRACTIC EXAMINING BOARD

Terry K. Freitag, D.C.
By a Member of the Board

BEFORE THE STATE OF WISCONSIN
CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY
PROCEEDINGS AGAINST

JASON J. JACOB, D.C.,
RESPONDENT.

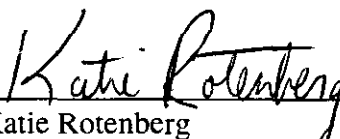
AFFIDAVIT OF SERVICE

Katie Rotenberg, being first duly sworn on oath deposes and states that she is in the employ of the Department of Regulation and Licensing, and that on October 15, 1996, she served the following upon the respondent's attorney:

Final Decision and Order dated October 4, 1996, LS9508021CHI

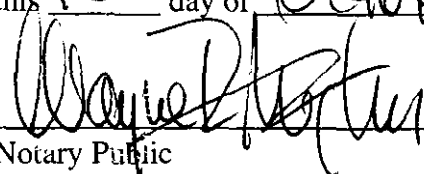
by mailing a true and accurate copy of the above-described document, which is attached hereto, by certified mail with a return receipt requested in an envelope properly addressed to the above-named respondent's attorney at:

Barry Szymanski, Attorney
Barry Szymanski Associates, S.C.
2300 North Mayfair Road
Wauwatosa, WI 53226-1501
Certified P 213 148 644


Katie Rotenberg
Department of Regulation and Licensing

Subscribed and sworn to before me

this 15th day of October, 1996.


Notary Public
Dane County, Wisconsin
My Commission is Permanent

NOTICE OF APPEAL INFORMATION

Notice Of Rights For Rehearing Or Judicial Review, The Times Allowed For Each, And The Identification Of The Party To Be Named As Respondent.

Serve Petition for Rehearing or Judicial Review on:

STATE OF WISCONSIN CHIROPRACTIC EXAMINING BOARD

1400 East Washington Avenue

P.O. Box 8935

Madison, WI 53708.

The Date of Mailing this Decision is:

October 15, 1996

1. REHEARING

Any person aggrieved by this order may file a written petition for rehearing within 20 days after service of this order, as provided in sec. 227.49 of the *Wisconsin Statutes*, a copy of which is reprinted on side two of this sheet. The 20 day period commences the day of personal service or mailing of this decision. (The date of mailing this decision is shown above.)

A petition for rehearing should name as respondent and be filed with the party identified in the box above.

A petition for rehearing is not a prerequisite for appeal or review.

2. JUDICIAL REVIEW.

Any person aggrieved by this decision may petition for judicial review as specified in sec. 227.53, *Wisconsin Statutes* a copy of which is reprinted on side two of this sheet. By law, a petition for review must be filed in circuit court and should name as the respondent the party listed in the box above. A copy of the petition for judicial review should be served upon the party listed in the box above.

A petition must be filed within 30 days after service of this decision if there is no petition for rehearing, or within 30 days after service of the order finally disposing of a petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30-day period for serving and filing a petition commences on the day after personal service or mailing of the decision by the agency, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing this decision is shown above.)

BEFORE THE STATE OF WISCONSIN
CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY :
PROCEEDINGS AGAINST :

AFFIDAVIT OF SERVICE

JASON J. JACOB, D.C., :
RESPONDENT. :

Pamela A. Haack, being first duly sworn on oath deposes and states that she is in the
employ of the Department of Regulation and Licensing, and that on October 21, 1996, she served
the following upon the respondent's attorney:

Letter dated October 18, 1996 with Affidavits of Costs, LS9508021CHI

by mailing a true and accurate copy of the above-described document, which is attached hereto,
by certified mail, with a return receipt requested in an envelope properly addressed to the
above-named respondent's attorney at:

Barry Szymanski, Attorney
Barry Szymanski Associates, Inc.
2300 North Mayfair Road
Wauwatosa, WI 53226-1501
Certified P 213 148 678

Pamela A. Haack

Pamela A. Haack
Department of Regulation and Licensing

Subscribed and sworn to before me

this 23rd day of October, 1996.

Donald R. Rapp

Notary Public
Dane County, Wisconsin
My Commission is Permanent

UNITED STATES POSTAL SERVICE



DO COME
V.D.

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

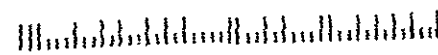
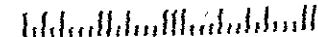
• Print your name, address, and ZIP Code in this box •

96 OCT 23 AIT 9:17

REGULATION & LICENSING

Department of Regulation & Licensing
Office of Board Legal Services
P.O. Box 8935
Madison, Wisconsin 53708

Jacob
LS9508021CHI



Is your RETURN ADDRESS completed on the reverse side?

SENDER:

- Complete items 1 and/or 2 for additional services.
- Complete items 3, 4a, and 4b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:

Barry Szymanski, Attn.
Barry Szymanski Associates
2300 N Mayfair Rd
Wauwatosa WI 53226
1501

4a. Article Number

P213148678

4b. Service Type

- | | |
|---|---|
| <input type="checkbox"/> Registered | <input checked="" type="checkbox"/> Certified |
| <input type="checkbox"/> Express Mail | <input type="checkbox"/> Insured |
| <input type="checkbox"/> Return Receipt for Merchandise | <input type="checkbox"/> COD |

7. Date of Delivery

10-22-96

5. Received By (Print Name)

8. Addressee's Address (Only if requested and fee is paid)

6. Signature: (Addressee or Agent)

X *James Weber*

PS Form 3811, December 1994

Domestic Return Receipt

Thank you for using Return Receipt Service.

Page 177

P 213 148 678

US Postal Service

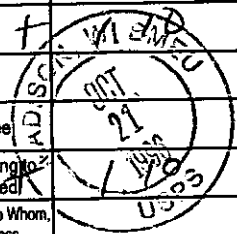
Receipt for Certified Mail

No Insurance Coverage Provided.

Do not use for International Mail (See reverse)

Reggie 1400 E Wash
PS Form 3800, April 1995

Sent to	
Barry Szymanski, Attn	
Street & Number	
2300 N Mainfair Rd	
Post Office, State, & ZIP Code	
Wauwatosa 53226-1501	
Postage	\$.55
Certified Fee	1.00
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	
Return Receipt Showing to Whom, Date, & Addressee's Address	
TOTAL Postage & Fees	\$ 2.75
Postmark or Date	
10/21/96 Ltr with costs	
LS 9508021 CHI Sac	





State of Wisconsin \ DEPARTMENT OF REGULATION & LICENSING

Tommy G. Thompson
Governor

Marlene A. Cummings
Secretary

1400 E. WASHINGTON AVENUE
P.O. BOX 8935
MADISON, WISCONSIN 53708-8935
(608) 266-2112

October 21, 1996

BARRY SZYMANSKI, ATTORNEY
BARRY SZYMANSKI ASSOCIATES, INC.
2300 NORTH MAYFAIR ROAD
WAUWATOSA WI 53226-1501

RE: In The Matter of Disciplinary Proceedings Against Jason J. Jacober, D.C.,
Respondent, LS9508021CHI, Assessment of Costs

Dear Mr. Szymanski:

On October 4, 1996, the Chiropractic Examining Board issued an order involving the license to practice chiropractic of Jason J. Jacober, D.C. The order requires payment of the costs of the proceedings.

Enclosed please find the Affidavits of Costs of the Office of Board Legal Services and the Division of Enforcement in the above captioned matter. The total amount of the costs of the proceedings is \$4,763.85.

Under sec. RL 2.18, Wis. Adm. Code, objections to the affidavits of costs shall be filed in writing. Your objections must be received at the office of the Chiropractic Examining Board, Room 174, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before November 3, 1996. After reviewing the objections, if any, the Chiropractic Examining Board will issue an Order Fixing Costs. Under sec. 440.23, Wis. Stats., the board may not restore or renew a credential until the holder has made payment to the department in the full amount assessed.

Thank you.

Sincerely,

Pamela A. Haack
Administrative Assistant
Office of Board Legal Services

Enclosures

cc: Chiropractic Examining Board
Department Monitor

Regulatory Boards

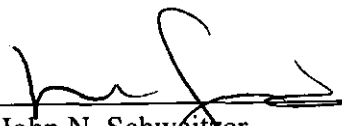
Accounting; Architects, Landscape Architects, Professional Geologists, Professional Engineers, Designers and Land Surveyors; Auctioneer; Barbering and Cosmetology; Chiropractic; Dentistry; Dietitians; Funeral Directors; Hearing and Speech; Medical; Nursing; Nursing Home Administrator; Optometry; Pharmacy; Physical Therapists; Psychology; Real Estate; Real Estate Appraisers; Social Workers, Marriage and Family Therapists and Professional Counselors; and Veterinary

b. Court Reporter Costs, paid by the Office of Board Legal Services.

12/4/95	Attendance	\$125.00
12/4/95	348 pages of transcript	\$1,148.40
5/22/96	Disk copy of transcript	\$80.00

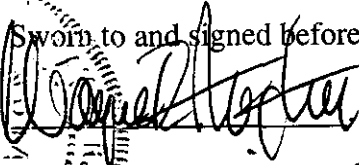
Total: \$1,353.40

Total allocable costs for Office of Board Legal Services = \$2,332.70



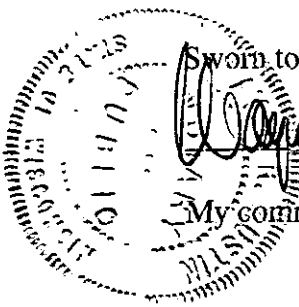
John N. Schweitzer
Administrative Law Judge

Sworn to and signed before me this 15th day of October 1996.



Notary Public, State of Wisconsin.

My commission is permanent.



State of Wisconsin
Before the Chiropractic Examining Board

In the Matter of Disciplinary Proceedings Against

Jason J. Jacober, D.C.
Respondent
Case 93 CHI 082

Affidavit of Costs of the Division of Enforcement

State of Wisconsin,
County of Dane, ss:

James E. Polewski, being first duly sworn on oath, deposes and says

1. He is an attorney licensed to practice law in the state of Wisconsin, employed by the Division of Enforcement, Department of Regulation and Licensing.

2. In the course of that employment, he was assigned to prosecute the captioned matter, and in the course of that assignment he knows that the Division expended the following amounts of time and committed the Department to payment of the following expenses:

Investigator Time

<u>Date</u>	<u>Activity</u>	<u>Time</u>
5/4/94	Investigative stop at Respondent's office	1 hour
5/17/94	Letter to Respondent, request records and information	.5 hour
6/15/94	Follow up letter to Respondent	1 hour
6/27/94	Review Respondent's response	<u>.25 hour</u>
	Total Investigator Time	2.75 hour
	Assessable costs, Investigator, 2.75 hours @ \$21.00	\$57.75

Attorney Time

<u>Date</u>	<u>Activity</u>	<u>Time</u>
6/20/95	Review file, begin plan	.75 hour
7/26/95	Telephone contacts, witness and board advisor	
	Begin draft complaint	1.75 hours
7/27/95	Telephone contact, board advisor	.2 hour
	Complaint draft review	.25 hour

8/2/95	Telephone contact, witness	.2 hour
9/26/95	Letter to complaining witness	.25 hour
9/27/95	Prehearing	.4 hour
	Letter to Respondent's attorney, witness	.5 hour
10/31/95	Letter to Respondent's attorney	.5 hour
11/21/95	Witness interview, deposition preparation	5 hours
11/26/95	Deposition preparation	.5 hour
11/27/95	Deposition defense	5 hours
11/28/95	Return to home office	2.5 hours
	Prehearing	.5 hour
	Telephone contact, complaining witness	.25 hour
	Draft settlement stipulation, letter to Respondent's attorney	1 hour
	Telephone contact, Respondent's attorney	.1 hour
11/29/95	Telephone contact, witness preparation	.2 hour
11/30/95	Hearing preparation	4.5 hours
12/1/95	Hearing preparation	4.5 hours
12/4/95	Witness preparation	.5 hour
	Hearing	7.5 hours
12/5/95	Post hearing memorandum drafting	.75 hour
6/3-13/96	Drafting objections, substitute final decision	12 hours
6/5/96	Letters to witnesses	.25 hour
6/13/96	Letters to witnesses	.25 hours
8/8/96	Drafting affidavit of costs	<u>.75 hour</u>
	Total attorney time:	50.75 hours

Assessable cost, attorney time, 50.75 hours @ \$42.00: \$2131.50

Disbursements, Division of Enforcement	
Deposition transcript, Sally Dzelzkalns	\$162.90
Food and Lodging, 11/27/95	74.00
Breakfast, 11/28/95	<u>5.00</u>
Total assessable disbursements	\$241.90

TOTAL ASSESSABLE COSTS, DIVISION OF ENFORCEMENT: \$2431.15

James E. Polewski
James E. Polewski

Sworn to and subscribed before me this 9th day of August, 1996.

Sharon Hines
Notary Public
My Commission Expires December 13, 1998.

STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF DISCIPLINARY
PROCEEDINGS AGAINST

JASON J. JACOB, D.C.,
RESPONDENT.

NOTICE OF FILING
PROPOSED DECISION
LS9508021CHI

TO: Barry Szymanski, Attorney
Barry Szymanski Associates, S.C.
2300 North Mayfair Road
Wauwatosa, WI 53226-1501
Certified Z 091 396 878

James E. Polewski, Attorney
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708


PLEASE TAKE NOTICE that a Proposed Decision in the above-captioned matter has been filed with the Chiropractic Examining Board by the Administrative Law Judge, John N. Schweitzer. A copy of the Proposed Decision is attached hereto.

If you have objections to the Proposed Decision, you may file your objections in writing, briefly stating the reasons, authorities, and supporting arguments for each objection. If your objections or argument relate to evidence in the record, please cite the specific exhibit and page number in the record. Your objections and argument must be received at the office of the Chiropractic Examining Board, Room 174, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before June 14, 1996. You must also provide a copy of your objections and argument to all other parties by the same date.

You may also file a written response to any objections to the Proposed Decision. Your response must be received at the office of the Chiropractic Examining Board no later than seven (7) days after receipt of the objections. You must also provide a copy of your response to all other parties by the same date.

The attached Proposed Decision is the Administrative Law Judge's recommendation in this case and the Order included in the Proposed Decision is not binding upon you. After reviewing the Proposed Decision, the Chiropractic Examining Board will issue a binding Final Decision and Order.

Dated at Madison, Wisconsin this 31st day of May, 1996.



John N. Schweitzer
Administrative Law Judge

STATE OF WISCONSIN
BEFORE THE CHIROPRACTIC EXAMINING BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS
AGAINST
JASON J. JACOB, D.C.,
RESPONDENT.

PROPOSED DECISION
Case No. LS-9508021-CHI
(93 CHI 082)

PARTIES

The parties in this matter under § 227.44, Stats., and § RL 2.037, Wis. Admin. Code, and for purposes of review under § 227.53, Stats., are:

Complainant:

Division of Enforcement
Department of Regulation and Licensing
Madison, WI 53708-8935

Respondent:

Jason Jacob, D.C.
4874 North Port Washington Road
Glendale, WI 53217

Disciplinary Authority

Chiropractic Examining Board
1400 East Washington Ave.
Madison, WI 53703

PROCEDURAL HISTORY

A. This case was initiated by the filing of a complaint with the Chiropractic Examining Board on August 2, 1995. A disciplinary proceeding (hearing) was scheduled for September 20, 1995. Notice of Hearing was prepared by the Division of Enforcement of the Department of Regulation and Licensing and sent by certified mail on August 2, 1995 to Jason J. Jacob, D.C., 4874 North Port Washington Road, Glendale, WI 53217. This notice was returned unclaimed. A second notice for a hearing date to be determined was sent to Dr. Jacob at 6125 West Capitol Drive, Milwaukee, WI 53216 on August 31, 1995. The second notice was received by Dr. Jacob's office on September 1, 1995.

B. An answer was filed on September 18, 1995 on behalf of Dr. Jacober by attorney Barry Szymanski of Barry Szymanski Associates, S.C., 2300 North Mayfair Road, Wauwatosa, WI 53226-1501.

C. A prehearing conference was held on September 27, 1995 and the hearing was scheduled for December 4, 1995.

D. A prehearing conference was held on October 31, 1995 to address the appearance of witnesses by telephone.

E. During the deposition of a witness on November 27, 1995, objections were heard by telephone and a ruling made that Mr. Szymanski could question the witness about medical treatment received during a limited time before and after her visit to Dr. Jacober.

F. Another prehearing conference was held during the week before the hearing regarding the availability of a witness, and Mr. Szymanski requested an accommodation to allow him to offer testimony by the witness. The issue was held open, to be decided at the hearing.

G. All time limits and notice and service requirements having been met, the disciplinary proceeding was held as scheduled on December 4, 1995. Dr. Jacober appeared in person and represented by attorney Szymanski. The Chiropractic Examining Board was represented by attorney James Polewski of the Department's Division of Enforcement. The hearing was recorded, and a transcript of the hearing was prepared and delivered on January 25, 1996. Confusion involving exhibits submitted with the answer, exhibits marked in a deposition, and additional exhibits marked in the hearing resulted in the hearing exhibits being marked 1 through 8 and 12 through 17. The testimony and exhibits entered into evidence at the hearing form the basis for this Proposed Decision.

APPLICABLE RULE AND STATUTE

Chir 6.02 Unprofessional conduct. Unprofessional conduct by a chiropractor includes:

...

(12) Knowingly falsifying patient records.

...

(14) Obtaining or attempting to obtain any compensation for chiropractic services by fraud.

...

(20) Knowingly providing false information to the board or its representative.

...

446.04 Unprofessional conduct. Unprofessional conduct includes, without limitation because of enumeration:

(1) Any conduct of a character likely to deceive or defraud the public

...

FINDINGS OF FACT

1. The respondent, Jason J. Jacober, D.C., is a chiropractor licensed in the state of Wisconsin, under license number 2750, which he has held continuously since it was originally granted on September 12, 1991.

2. Dr. Jacober provided professional services on May 1, 1993 to Mrs. Sally Dzelzkalns in his office at Menomonee Falls Chiropractic in Menomonee Falls, Wisconsin. Menomonee Falls Chiropractic is also referred to as Capitol Chiropractic. Mrs. Dzelzkalns had suffered continuing complications, including neck pain, from an auto accident in 1991. She had received steroid injections and physical therapy, but on one occasion in March of 1993 had received relief from a massage. On Saturday, May 1, 1993, she woke with stiffness in her neck. Her husband, Martin Dzelzkalns, looked for a masseuse in the Yellow Pages and located a listing for Dr. Varona, who informed him that his masseuse was unavailable, but that he would have someone contact Mr. Dzelzkalns. Shortly afterward, Dr. Jacober called, said that he had no masseuse, but that he had equipment for electrical muscle stimulation. Mr. Dzelzkalns then either made an appointment for his wife for 10:00 that morning or let her make the appointment directly. Dr. Jacober's receptionist called her back and asked her to arrive early so that x-rays could be taken, but she told the receptionist that she wanted only a massage. The receptionist then asked her to arrive early to fill out forms.

3. When Mrs. Dzelzkalns arrived at Dr. Jacober's office 10 to 15 minutes prior to her appointment, the receptionist had left for the day, and Dr. Jacober asked her to fill out a Confidential Patient Case History and a General Consent to Care and Assignment of Insurance Benefits. She then waited in the waiting room for a period which she estimated as 40 to 45 minutes while he attended to other patients.

4. When Dr. Jacober returned, he asked her questions related to the entries she had made on the Confidential Patient Case History, and asked her again if she would allow him to take x-rays, but she refused. Based on her responses on the Confidential Patient Case History, Dr. Jacober considered that he was treating a person with complaints of occasional loss of sleep, frequent pain between her shoulders, and frequent pain or numbness in her shoulders and legs (which can be an early symptom of serious neurological problems). Mrs. Dzelzkalns considered her complaint that morning to be stiffness in her neck and shoulders.

5. Dr. Jacober completed a form labeled "Chiropractic Clinical Examination" prior to providing treatment. To complete the form, he used the following sources of information:

- the Confidential Patient Case History, for information such as the absence of any complaints regarding her lower back, her wrists and fingers, or her eyes, ears, nose and throat;
- questions of Mrs. Dzelzkalns, for information such as her height and dermatome response;
- observations of Mrs. Dzelzkalns' appearance, for information such as the absence of respiratory difficulties;
- observations of Mrs. Dzelzkalns' range of motion when he asked her to move her head; and

- a brief physical examination, including head and neck compression tests, spinal palpation, and pulse and blood pressure, which he recorded as 135 over 82.

Dr. Jacober did not perform pinwheel tests, nor did he perform Adson's test or Wright's test on Mrs. Dzelzkalns. Dr. Jacober reported in his notes of his contact with Mrs. Dzelzkalns that she had been seen on an emergency basis, by which he meant only that he saw her on an hour's notice without a prior appointment.

6. Following the completion of his examination, Dr. Jacober provided Mrs. Dzelzkalns with unattended electrical muscle stimulation for 12 minutes, combined with an ice pack. When he returned, he provided a brief period of manual traction. Before and after this treatment, Dr. Jacober engaged in discussion with Mrs. Dzelzkalns about the possible benefits of alternative treatment, specifically chiropractic, since she had improved little over two years of treatment. When she left, he provided her with one or more ice packs and instructions for their use. Mrs. Dzelzkalns was the last patient Dr. Jacober saw that morning, and she estimated that she arrived home at approximately 11:15 after a drive of approximately 10 to 15 minutes.

7. Dr. Jacober estimated for billing purposes that he spent approximately 60 minutes providing services to Mrs. Dzelzkalns. This was an overestimate.

8. The 60-minute estimate does not appear in Dr. Jacober's office records, and he did not falsify the records of his examination of Mrs. Dzelzkalns.

9. Mrs. Dzelzkalns's husband called Dr. Jacober's office on Monday, May 3, 1993 to inquire about the bill for treatment, which he expected to have to pay directly since his health insurance coverage with Blue Cross & Blue Shield United of Wisconsin (hereinafter "Blue Cross") did not cover massages. He was upset when he was told that the charges totaled \$250. Mr. Dzelzkalns went to Dr. Jacober's office to obtain an itemized bill. Upon receiving it, he became offensive and stated either that he would sue Dr. Jacober, or that he would only pay \$100 for the "modalities" and that Dr. Jacober would have to sue him for the charge of \$150 for the office visit and examination. Mr. Dzelzkalns requested his wife's records; Dr. Jacober refused, and Mr. Dzelzkalns had his wife come in to request them. Dr. Jacober stated that any further communication should be through his attorney and gave Mr. Dzelzkalns the attorney's name. Mr. Dzelzkalns demanded the attorney's phone number, which Dr. Jacober did not provide. Both Mr. Dzelzkalns and Dr. Jacober were disturbed. Mr. Dzelzkalns did not leave, and Dr. Jacober had his secretary call the police. Mr. Dzelzkalns and his wife waited until the police arrived, at which time they were escorted from Dr. Jacober's office.

10. On or about May 6, 1993, Dr. Jacober submitted a claim form to Blue Cross, requesting payment for treatment provided to Mrs. Dzelzkalns on May 1, 1993. [exhibit 12, p. 2] Dr. Jacober claimed payment for services under five Current Physician Terminology ("CPT") codes, as follow:

- 99205 \$150 - Office or other outpatient visit for the evaluation and management of a new patient.
- 97014 \$20 - Electric muscle stimulation [unattended]; interferential.
- 97010 \$15 - Cryo-therapy applied to Patient; physical medicine treatment to one area; hot or cold packs.

97122 \$15 - Manual traction applied to cervical spine.

9907024 \$11 - Supplies and materials

Dr. Jacober did not include a code for an emergency office visit. Blue Cross changed the 99205 code to a code of A2000 (a Blue Cross internal code for a chiropractic office visit carrying a usual and customary charge of \$26), and changed the 9907024 code to a code of A9195 for "cryo-pack supplied to Patient". On May 26, 1993 Blue Cross mailed a Provider Remittance Advice to Dr. Jacober and an Explanation of Benefits form to Mrs. Dzelzkalns. [exhibit 7] The A2000 code continued to show the amount claimed by Dr. Jacober as \$150, though Blue Cross reduced the reimbursement to \$20.80, with a \$5.20 co-payment.

11. On May 28, 1993, Mr. Dzelzkalns called the Blue Cross fraud investigation unit to report what he considered to be overbilling, and Russell Streur interviewed Mrs. Dzelzkalns on June 1, 1993.

12. Following the mailing of the Provider Remittance Advice on May 26th, Dr. Jacober's office called Blue Cross to request that the A2000 code be changed back to a 99205 code. The request was reviewed and denied, at which time Dr. Jacober's office called a second time and insisted that it be changed back. The claim was changed and a revised Provider Remittance Advice was mailed on June 15, 1993. [exhibit 8] The claim for code 99205 was reimbursed by Blue Cross for \$120, with a co-payment of \$30.

13. The co-pay amount of Dr. Jacober's claim was not paid by the Dzelzkalns, and the claim was sent to a collection agency, which notified the Dzelzkalns by letter, but the amount has never been paid.

14. The description of the service to be billed under CPT code 99205 is as follows:

"Office or other outpatient visit for the evaluation and management of a new patient, which requires these three components:

- a comprehensive history;
- a comprehensive examination; and
- medical decision making of high complexity.

Counseling and/or coordination of care with other providers or agencies are provided consistent with the nature of the problem(s) and the patient's and/or family's needs. Usually, the presenting problem(s) are of moderate to high severity. Physicians typically spend 60 minutes face-to-face with the patient and/or family."

15. Four types of "history" are recognized by the CPT guidelines, as follow:

- Problem Focused - chief complaint; brief history of present illness or problem.
- Expanded Problem Focused - chief complaint; brief history of present illness; problem pertinent system review.
- Detailed - chief complaint; extended history of present illness; extended system review; **pertinent** past, family and/or social history. [emphasis in original]
- Comprehensive - chief complaint; extended history of present illness; complete system review; **complete** past, family and social history. [emphasis in original]

16. Dr. Jacober elicited information from Mrs. Dzelzkalns regarding her chief complaint, a brief history of her present condition, and a problem pertinent system review. He did not take a comprehensive history of Mrs. Dzelzkalns.

17. Four types of "examination" are recognized by the CPT guidelines, as follow:

- Problem Focused - an examination that is limited to the affected body area or organ system.
- Expanded Problem Oriented - an examination of the affected body area or organ system and other symptomatic or related organ systems.
- Detailed - an extended examination of the affected body area(s) and other symptomatic or related organ system(s).
- Comprehensive - a complete single system specialty examination or a complete multi-system examination.

18. Dr. Jacober conducted an examination of Mrs. Dzelzkalns's affected body area, and cursorily noted the absence of symptoms in other body systems. He did not perform a comprehensive examination of Mrs. Dzelzkalns.

19. Four types of "medical decision making" are recognized by the CPT guidelines: straightforward, low complexity, moderate complexity, and high complexity. To qualify for a given type of decision making, two of the three elements in the following table must be met or exceeded:

	Number of diagnoses or management options	Amount and/or complexity of data to be reviewed	Risk of compli- cations and/or morbidity or mortality
Straightforward	<i>minimal</i>	<i>minimal or none</i>	<i>minimal</i>
Low Complexity	<i>limited</i>	<i>limited</i>	<i>low</i>
Moderate Complexity	<i>multiple</i>	<i>moderate</i>	<i>moderate</i>
High Complexity	<i>extensive</i>	<i>extensive</i>	<i>high</i>

20. Dr. Jacober's medical decision making with regard to Mrs. Dzelzkalns involved a limited number of diagnoses or management options, a limited amount and complexity of data to be reviewed, and a low risk of complications, morbidity or mortality. He did not provide medical decision making of high complexity to Mrs. Dzelzkalns.

21. Dr. Jacober's use of billing code 99205 was inappropriate.

22. Dr. Jacober provided false information to the Division of Enforcement by stating in his letter of June 24, 1994 that he had checked Mrs. Dzelzkalns's height and weight and that he performed a pinwheel test, Adson's test and Wright's test on her. Also, because the billing code he used on his claim to Blue Cross was inaccurate, he provided false information by asserting that he had performed all the services for which he billed Blue Cross.

CONCLUSIONS OF LAW

I. The Chiropractic Examining Board is the legal authority responsible for issuing and controlling credentials for chiropractors, under ch. 446, Stats. The Chiropractic Examining Board has jurisdiction over the subject-matter of a complaint alleging unprofessional conduct, under sec. 15.08(5)(c), Stats., sec. 446.05, Stats., and ch. Chir 6, Wis. Admin. Code. The Chiropractic Examining Board has personal jurisdiction over the respondent, Jason J. Jacober, D.C., under sec. 801.04 (2), Stats., based on his receiving notice of the proceeding, and his holding a credential issued by the board.

II. Dr. Jacober did not falsify his records for Mrs. Dzelzkalns, and he did not violate sec. Chir 6.02 (12), Wis. Admin. Code.

III. Dr. Jacober's conduct in filing a false claim with Blue Cross & Blue Shield United of Wisconsin for treatment he did not provide to Mrs. Dzelzkalns constitutes a violation of sec. Chir 6.02 (14), Wis. Admin. Code, and sec. 446.04, Stats.

IV. Dr. Jacober's notation in his office records that he saw Mrs. Dzelzkalns on an emergency basis was not shown to be inappropriate or a violation of any rule.

V. Dr. Jacober's conduct in providing false information to the Division of Enforcement and in reporting to the Division of Enforcement that he provided all of the services for which he billed Blue Cross & Blue Shield United of Wisconsin constitutes a violation of sec. Chir 6.02 (20), Wis. Admin. Code, and sec. 446.04, Stats.

VI. The violations in III and V above constitute unprofessional conduct under sec. Chir 6.02 and sec. 446.04, Stats., and discipline is appropriate, under sec. 446.03, Stats.

ORDER

THEREFORE IT IS ORDERED that the respondent, Jason J. Jacober, D.C., be reprimanded.

IT IS FURTHER ORDERED that the respondent, Jason J. Jacober, D.C., pay the costs of this proceeding, as authorized by sec. 440.22 (2), Stats., and sec. RL 2.18, Wis. Admin. Code, and if he fails to pay the costs within 90 days of the date of this order, his license will be summarily suspended, under sec. 440.22 (3), Stats.

OPINION

This is a disciplinary proceeding conducted under the authority of ch. 227, Stats. and ch. RL 2, Wis. Admin. Code. The Division of Enforcement in the Department of Regulation and Licensing filed a complaint with the Chiropractic Examining Board alleging that the respondent, Jason J. Jacober, D.C., violated standards of conduct for chiropractors contained in sec. 446.04, Stats., and sec. Chir 6.02, Wis. Admin. Code. The burden of proof is on the department to show by a preponderance of the evidence that the alleged violations occurred. The disciplinary complaint alleged that Dr. Jacober (1) falsified records of an office visit on May 1, 1993 by Mrs. Sally Dzelzkalns, (2) filed a false claim for reimbursement based on that office visit, and (3) provided false information on those subjects to an investigator for the board. I conclude that Dr. Jacober did not falsify his records, but I do conclude that he persisted in making a claim which did not accurately reflect the services he provided, and that he also provided false information to an investigator for the board. The situation which ultimately led to this proceeding is stated in the findings of fact above, and will not be repeated in its full detail here.

On the two sides of this case stand two stubborn men, both feeling wronged and both standing on principle. If this department regulated ordinary citizens as well as chiropractors, I would recommend reprimands for both sides, as there were more than enough mistakes to go around.

Mr. Dzelzkalns started the chain of mis-steps when he called Dr. Varona looking for a massage for his wife, not anticipating that a medical provider might operate quite differently from a massage center. He expected to pay \$40-\$60 for a massage, and he expected to pay for it directly, since his health care coverage with Blue Cross would not pay for a massage. Dr. Varona had a listing for massage therapy in the Yellow Pages because he had previously had a masseuse on his staff, but that person had left, and Dr. Varona attempted to be helpful by having Dr. Jacober, who had electrical stimulation equipment, contact the Dzelzkalns. The result was that Mrs. Dzelzkalns ended up with an appointment with a chiropractor. A strong possibility exists that had Mrs. Dzelzkalns gone to Dr. Varona (a medical doctor) instead of Dr. Jacober (a doctor of chiropractic), Dr. Varona would have acted very much as Dr. Jacober did, by approaching her as a medical patient, asking for a similar medical history and performing at least a routine initial medical exam on her, before agreeing to provide the massage therapy which she was requesting.

When Dr. Jacober evaluated Mrs. Dzelzkalns, he determined correctly that she had significant and long-term problems, which had not improved significantly in the two years since her auto accident, and which in his professional opinion called for much more than electrical stimulation or a massage. He told her that he should take x-rays to properly treat her, and that he would be reluctant to provide any manipulations without x-rays, and in fact he did not, but he examined and treated Mrs. Dzelzkalns as a medical patient with a potentially significant complaint and, not surprisingly, his bill was higher than the \$40 to \$60 which Mr. Dzelzkalns expected. His billing for \$150 for the office visit in addition to the other charges was almost certainly too high, but the evidence is not strong enough to prove that Dr. Jacober falsified his office records to justify the bill.

Mrs. Dzelzkalns testified that he performed virtually no examination at all. She remembered being asked to move her head for range-of-motion tests, but denied that he touched her shoulders or back, that he examined her limbs, her eyes, ears, nose and throat, that he used a pinwheel to test her sense of touch, or that he took her pulse or blood pressure. Dr. Jacober asserted that he performed a comprehensive examination; he billed Blue Cross for a 60-minute comprehensive exam, and he told an investigator for the board that his exam was comprehensive. In the hearing, however, he explained that he based many of the entries on his Chiropractic Clinical Examination form on his general observations of her physical condition and on the absence of any complaints about other areas or systems, such as her lower back, her limbs, or her eyes, ears nose, and throat. This can hardly be called a comprehensive examination, but Dr. Jacober's description did adequately explain most of the entries on his form, and no evidence was presented to show that such a shallow examination is unprofessional *per se*.

Two details of the exam were highlighted during testimony as presenting unusual problems. The first was Mrs. Dzelzkalns's height. Dr. Jacober recorded her height as 5'6" although she testified that she is at least 5'8". Dr. Jacober stated that he did not measure it, but merely asked her that question. The discrepancy is inexplicable, and it does suggest that Dr. Jacober made up the height and most of his other entries later, but such an assumption is disproven by the second detail, the blood pressure reading, which Mrs. Dzelzkalns said is normally about 130 over 80. Dr. Jacober recorded her blood pressure as 135 over 82, and this is far too accurate to be a coincidence or a lucky guess. This one solid fact anchors a finding that Dr. Jacober's written recollection of the exam is more credible than Mrs. Dzelzkalns's and that he did in fact take her pulse and blood pressure, perform head and neck compression tests, and palpate her spine. One other inference supports Dr. Jacober's testimony that he did not falsify records after the fact: had he made entries or changes later, he could easily, and would likely, have altered more items in order to support his position more firmly, such as making notations of the time he spent with Mrs. Dzelzkalns.

Although Dr. Jacober did not falsify his records, he did make a couple of serious mistakes. The first was when he estimated on the extreme high end of the time he spent with Mrs. Dzelzkalns and recorded for his office staff that he spent 60 minutes providing services to her. The evidence is convincing that this was an overstatement. Dr. Jacober did not record any times to support his estimate, and the only usable estimates of time come from Mrs. Dzelzkalns. When she was interviewed by the Fraud investigator for Blue Cross [exhibit 14, p. 4], she estimated that she met face-to-face with Dr. Jacober for only two minutes, but this was certainly incorrect. In the hearing, she provided the following rough outline:

- her appointment was for 10:00;
- when she arrived 10 to 15 minutes early, Dr. Jacober gave her the forms to complete and she then waited 40 to 45 minutes;
- she then talked to him and had 10 to 15 minutes of unattended electrical stimulation therapy;

- finally, she arrived home at approximately 11:15, after a drive of 10 to 15 minutes. Calculating the times in the light most favorable to Dr. Jacober, but within this framework, he spent no more than 28 minutes face-to-face with Mrs. Dzelzkalns in addition to the 12 minutes of unattended therapy. This is quite a bit more than Mrs. Dzelzkalns was willing to admit, and quite a bit less than Dr. Jacober estimated, but it seems about right. The total elapsed time from his first contact with her to her departure was over an hour, but he did not spend 60 minutes face-to-face with her.

In and of itself, Dr. Jacober's 60-minute estimate was not so much actionable fraud as it was an exaggeration. Lawyers and other professionals may recognize the deplorable but all-too-common practice of rounding billing periods up, and I consider that this is most likely what happened. He exaggerated, just as he exaggerated when he said he saw Mrs. Dzelzkalns on an "emergency" basis. (No evidence was presented to show that it was improper for Dr. Jacober to use the word "emergency" to refer to an office visit set up on an hour's notice, especially since he did not claim additional reimbursement from Blue Cross by submitting a code which designated emergency treatment to them. However, it may be indicative of a tendency to inflate, which is reflected in his estimate of 60 minutes and his statement that he provided three to five minutes of manual traction.) Dr. Jacober's unfortunate estimate of one hour, which he dictated or wrote down for his office staff to use for billing, was then compounded by an established but ill-considered office policy whereby his staff billed based on the amount of time he spent with a patient rather than on the complexity of the services he provided [transcript, p. 275, lines 6-22]. This resulted in the billing code of 99205, which contains the description "Physicians typically spend 60 minutes face-to-face with the patient and/or family," but the code also requires a comprehensive history, a comprehensive examination, and medical decision making of high complexity, none of which Dr. Jacober performed. He did perform, in some manner, the tests and exams which he recorded in his worksheet, but those were not enough to justify a claim under code 99205.

There is no disagreement that Dr. Jacober provided approximately 12 minutes of unattended electrical stimulation to Mrs. Dzelzkalns, but he and she disagree over two other details. She insists that he placed a heat pack on her back along with the electrical stimulation electrodes, while he testified that it was a cold pack. She states that he performed no manual traction on her head and neck, while he asserts that he did. No concrete fact (such as the blood pressure reading above) strongly supports either side, and in the face of such a disagreement, with two equally credible witnesses, the issue must be resolved by the burden of proof. A preponderance of the evidence was not adduced to disprove the respondent's statement of the facts, and therefore his version stands. Consequently, I have made findings that he applied a cold pack and that he provided some manual traction. Finally, both Dr. Jacober and Mrs. Dzelzkalns agree that he told her to return on Monday, and that if she wasn't feeling "at least 50% better", to call him the next day (Sunday) and he would see her on an emergency basis.

Dr. Jacober's second big mistake was digging in his heels once Mr. Dzelzkalns challenged his bill. Dr. Jacober's reaction is somewhat understandable, because when Mr. Dzelzkalns was told about, and later saw, a bill for \$250, he behaved quite badly. Mr.

Dzelzkalns admits that he may have been "sarcastic" with Dr. Jacober's receptionist. Dr. Jacober says that Mr. Dzelzkalns used obscenities on the phone, and that when he came in to the office later, he was so loud and verbally abusive that the receptionist was scared to stay in the front office area with him. Mr. Dzelzkalns remembers saying that he would only pay \$100 for the "modalities" and that Dr. Jacober would have to sue him for the \$150 office visit. (Dr. Jacober remembers Mr. Dzelzkalns saying that he would sue him.) At that point, as Mr. Dzelzkalns so aptly put it in the hearing, Dr. Jacober "lost his composure **as well**" [emphasis added]. Mr. Dzelzkalns's manner caused Dr. Jacober to react by calling the police, and rather than leave, Mr. Dzelzkalns waited for the police to arrive, at which time he was escorted out. By this time both men were tenaciously, even ferociously, attached to their principles: Dr. Jacober to the accuracy of the billing, and Mr. Dzelzkalns to its inaccuracy. As stated above, Dr. Jacober's reaction to Mr. Dzelzkalns's uncivilized behavior may be understandable, but it was a human reaction and not a professional one. The nature of the confrontation between these two men, combined with Dr. Jacober's offer to see Mrs. Dzelzkalns on an emergency basis on a Sunday, and the incidental fact that they were the only two people in the office for a period of time on Saturday, suggest something more behind this dispute than a mere disagreement over money, and the vehemence of Mr. Dzelzkalns's response smacks of jealousy, but no other evidence was presented which would illuminate this possibility, and it would make no difference to this issues in this case anyway.

Dr. Jacober submitted his claim to Blue Cross, which changed his code for the office visit from 99205 (indicating a patient contact of unusual intensity and difficulty) to A2000 (indicating a routine visit). Dr. Jacober insisted that it be changed back, possibly because he thought Mr. Dzelzkalns had effected the change, possibly because (as he said in the hearing) he thought A2000 inappropriately indicated a Medicare claim, possibly because accepting the change would seem to be at least a tacit admission that Mr. Dzelzkalns was right, or just possibly because he thought 99205 was the right code. Blue Cross reviewed the coding change once at Dr. Jacober's request and declined to change it, but Dr. Jacober insisted a second time, and the change was made. As was stated repeatedly in the hearing, Dr. Jacober had numerous opportunities to settle this case by reducing his claim for services, and I am convinced that at some point he must have realized that there was some weakness in his use of the code 99205 for the services he had provided to Mrs. Dzelzkalns. Nevertheless, he refused to accept any change, whether out of stubbornness, loyalty to his verbally-wounded office staff, a desire not to be bested, or all of the foregoing. Unfortunately for Dr. Jacober, the 99205 claim is simply not justified. At some point he knew, or should have known, or should have informed himself and discovered, that the 99205 code was incorrect. He submitted a bill which does not fit within the guidelines for the billing code he (or his office staff) chose, and this gave rise to legitimate concerns, by the patient and her husband, by the Blue Cross investigator, and by the board, about fraud. A finding that he overbilled must be made, and as Dr. Jacober is the only person regulated by this department, he is the one on whom discipline will fall for his share of the mistakes in this case and his stand on principle.

Dr. Jacober's correspondence with the board investigator [exhibits 15 & 16] also suffered from his dedication to "principle" and his somewhat stubborn determination to hold fast to the billing code for a comprehensive exam. As a result, he provided some false information to the

investigator for the board, although not in the sense in which the charge was probably meant (which was that he lied outright about his office records). Based on the finding above that Dr. Jacober did perform an examination of Mrs. Dzelzkalns, however cursory, the vast majority of the information which he provided to the board investigator was truthful. However, he admitted in the hearing that he did not check her height and weight and that he did not perform Adson's test, Wright's test, or a pinwheel test, all of which he claimed to have done in his second letter to the board investigator. *The items which he misstated are simply irrational and incomprehensible, and they show not an intent to deceive but a general attitude of defiance, which can also be glimpsed in the cavalier tone of his answer purporting to explain initial, interim and final examinations.*

Discipline.

The purposes of professional discipline have been set forth in Wisconsin Supreme Court Rule SCR 21.03(5) and in various attorney discipline cases, including Disciplinary Proc. Against Kelsay, 155 Wis.2d 480, 455 N.W.2d 871 (1990). In that case the Wisconsin Supreme Court stated "discipline for lawyer misconduct is not intended as punishment for wrongdoing; it is for the protection of the public, the courts and the legal profession from further misconduct by the offending attorney, to deter other attorneys from engaging in similar misconduct and to foster the attorney's rehabilitation." That reasoning has been extended by regulatory agencies to disciplinary proceedings for other professions.

In my reading of the cases, the term "rehabilitation" means what is necessary to make a person conform his or her behavior to the requirements of the profession, and it covers both positive and negative reinforcement to deter the offender from similar behavior in the future. See, for example, State v. Postorino, 53 Wis.2d 412, 193 N.W.2d 1 at 4 (1972). Thus, even though the purpose of discipline is not to impose punishment *per se*, appreciating the unpleasant consequences of unprofessional behavior is part of rehabilitation.

Dr. Jacober did not falsify records, but he let himself get locked into a wrong billing code, stubbornly refused to correct a possible error, and then compounded his unprofessional conduct by responding to an investigator for the board in a less-than-forthcoming and less-than-totally-truthful way. Discipline is certainly appropriate, but there is little need to apply it for its deterrent effect on the rest of the profession. Also, the discipline need not be severe. Simply having to accept his share of the responsibility should be enough to chasten Dr. Jacober and allow him to admit in the future that he may be wrong, which was what he found impossible to do here. I have recommended a reprimand, which is public acknowledgment that at least some of the mistakes were his.

Costs.

The assessment of costs against a disciplined professional is authorized by sec. 440.22(2), Wis. Stats. and sec. RL 2.18, Wis. Admin. Code, but neither the statute nor the rule clearly indicates the circumstances in which costs are to be imposed. One approach is routinely to impose the costs of investigating and prosecuting unprofessional conduct on the disciplined individual rather than on the profession as a whole. Because this case went to hearing as a matter of principle on both sides, and both sides made serious mistakes, the parties should logically split the cost. Unfortunately for

Dr. Jacober, the board has no authority to impose costs on a complaining witness, but the profession as a whole should nevertheless not have to foot the bill for this action. Costs are to be assessed against Dr. Jacober.

Dated and signed: May 31, 1996

A handwritten signature in black ink, appearing to read 'J. N. Schweitzer', is written over a horizontal line.

John N. Schweitzer
Administrative Law Judge
Department of Regulation and Licensing